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Public Prosecutor v Mohamad Hafizul bin Che Mohamad Zahid and another case

B HIGH COURT (KOTA BHARU) — CRIMINAL TRIAL NOS 45A-04–02 OF 2017 AND 45A-05–02 OF 2017
AHMAD BACHE J
29 APRIL 2019

C *Criminal Law — Sentence — Drug offences — Interpretation of sub-s 39B(2A) — Sentencing — Factors to be considered — Balancing public interest and personal interest — Concurrent sentence for offences in the same transaction — Dangerous Drugs Act 1952 s 39B(2A)*

D The accused was charged with two counts of trafficking under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'), punishable under s 39B(2) or s 39B(2A) of the DDA, wherein the accused tried to evade arrest in which upon arresting the accused, the car that the accused was using was examined, and on E examination of a blue denim bag found on the front passenger seat of the car the police found the drugs. The accused also, after being read the caution under s 37B(1)(b) of the DDA admitted to keeping drugs in his rental house in which he subsequently lead the police to its discovery. The accused pleaded guilty to both charges. The court having been satisfied that there were no reason that F would render the plea to be qualified or could be vitiated by any other reason, after the prosecution tendered the facts and exhibits to which he also admitted them without any qualification, he was then convicted of the charges.

Held:

G (1) From a reading of the new sub-s 39B(2A) of the DDA, it was patently clear that this new provision was to create two classes of cases in terms of degree of probity in the commission of the offence and this provision catered to the lower degree whereby the case against the accused. Subparagraph (a) and (b) were to be read conjunctively, inter se and to be H read disjunctively from sub-para (c) and (d) (see para 14).

(2) In meting out that sentences and in determining whether to grant a life imprisonment sentence or impose the mandatory death sentence, the court should adopt the principle that public interest was of paramount I importance and should outweighed the personal interest of the accused (see para 15).

(3) The court had considered that the accused had pleaded guilty and this had saved the court's time and public fund enormously and substantially. The court had also considered the interest of the accused, inter alia, that

he was in early 20s at the time of the offence, married and worked as a lorry driver and stayed with his parents. This was also his first offence. He was both remorseful and regretful and wanted to turn over a new leaf upon completion of serving his prison sentence. The accused also suffered severe sickness in prison. In the circumstances of the case, having balanced the interest of the public and the interest of the accused and the objective of the amendment, the court exercised its discretion to sentence the accused to life imprisonment (see paras 29–31).

(4) It had been proven that whipping was an effective deterrent. The amendment made it plain that the number of strokes was 15 and in the present circumstances, the court was of the view that the maximum strokes should be meted to the accused (see para 32).

(5) As the present offence was committed on the same day, at the same time and at the same place with that of the other offence and that there was continuity of action and purpose, hence clearly the one transaction principle applied. What was more, the accused was charged for committing the same offence and under the same section of the DDA. Thus, the offences were also not distinct to each other. Hence the sentence should run concurrently (see para 37).

[Bahasa Malaysia summary

Tertuduh di tuduh dengan dua pertuduhan pengedaran dibawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('ADB') yang boleh dihukum dibawah s 39B(2) atau s 39B(2A) ADB, yang mana tertuduh telah cuba untuk mengelak daripada ditangkap dan semasa beliau ditangkap, kereta yang tertuduh gunakan telah diperiksa, dan selepas pemeriksaan satu beg berwarna biru yang ditemui di bahagian kerusi penumpang hadapan pihak polis telah menemui dadah tersebut. Tertuduh juga, selepas dibacakan amaran dibawah s 37B(1)(b) ADB mengakui menyimpan dadah dalam rumah sewanya yang mana dia kemudiannya membawa pihak polis kepada penemuannya. Tertuduh telah mengaku salah atas kedua-dua pertuduhan. Mahkamah setelah berpuas hati bahawa tiada sebab yang akan menyebabkan pengakuan tersebut berkecuali atau boleh digagalkan untuk apa-apa sebab, selepas pendakwaan mengemukakan fakta kes dan ekshibit yang mana diakui tanpa apa-apa pengecualian, dia telah disabitkan dengan pertuduhan-pertuduhan.

Diputuskan:

(1) Berdasarkan pembacaan sub-s baru 39B(2A) ADB, adalah jelas bahawa peruntukan baru ini adalah untuk mengadakan dua kelas berdasarkan tahap keterlibatan dalam perlakuan kesalahan dan peruntukan ini sepertimana kes terhadap tertuduh. Sub-perenggan (a) dan (b) perlu dibaca secara bersama, inter se, dan dibaca secara berasingan daripada sub-perenggan (c) dan (d) (lihat perenggan 14).

(2) Dalam memberikan hukuman dan menentukan sama ada untuk memberikan pemenjaraan seumur hidup atau untuk menjatuhkan hukuman penjara mandatori, mahkamah harus mengambil pendekatan bahawa kepentingan awam adalah utama dan perlu melebihi kepentingan peribadi tertuduh (lihat perenggan 15).

(3) Mahkamah telah menimbangkan bahawa tertuduh telah mengaku salah dan telah menjimatkan masa mahkamah dan wang awam. Mahkamah juga telah menimbangkan kepentingan tertuduh, inter alia, bahawa dia berusia dalam awal 20-an pada waktu kesalahan, berkahwin dan berkerja sebagai kelindan lori dan tinggal bersama ibu bapanya. Ini juga merupakan kesalahan kali pertama beliau. Dia juga telah insaf dan kesal dan berkeinginan untuk memulakan hidup baru setelah selesai menjalani hukuman pemenjaraannya. Tertuduh juga mengalami kesakitan dalam penjara. Dalam keadaan kes ini, setelah menimbangkan kepentingan awam dan kepentingan tertuduh dan matlamat pindaan, mahkamah menggunakan budibicaranya untuk mensabitkan tertuduh dengan pemenjaraan seumur hidup (lihat perenggan 29–31).

(4) Ianya dibuktikan bahawa hukuman sabitan merupakan deteren yang berkesan. Pindaan yang dibuat adalah jelas bahawa bilangan sebatan adalah 15 dan dalam keadaan ini, mahkamah berpendapat bahawa sebatan maksimum perlu diberikan kepada tertuduh (lihat perenggan 32).

(5) Memandangkan kesalahan ini dilakukan pada hari yang sama, pada waktu yang sama dan di tempat yang sama dengan kesalahan yang satu lagi dan wujud kerberterusan tindakan dan dibawah seksyen sama ADB. Oleh itu, kesalahan-kesalahan adalah tidak berbeza diantara satu sama lain. Oleh itu, hukuman harus berjalan seara serentak (lihat perenggan 37).]

Notes

For cases on drug offences, see 4(3) *Mallal's Digest* (5th Ed, 2018 Reissue) paras 4227–4228.

Cases referred to

Amrita Lal Hazra vs Emperor (1915) ILR 42 Cal 957, HC (refd)
Annantan Subramaniam v PP [2006] MLJU 648; [2007] 8 CLJ 1, HC (refd)
Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534, CA (refd)
Jayaraman & Ors v PP [1979] 2 MLJ 88 (refd)
Mohamed Abdullah Ang Swee Kang v PP [1988] 1 MLJ 167, SC (refd)
PP v Loo Choon Fatt [1976] 2 MLJ 256 (refd)
PP v Prabu s/o Veeramuthu & Ors [2009] 3 MLJ 838, HC (refd)
R v Ball (1951) 51 256 (refd)
Raja Izzuddin Shah v PP [1979] 1 MLJ 270 (refd)

Sau Soo Kim v PP [1975] 2 MLJ 134; [1975] 1 LNS 158, FC (refd)
Tan Sri Abdul Rahim bin Mohd Noor lwn Pendakwa Raya [2001] 1 MLJ 193, HC (refd)

Legislation referred to

Criminal Procedure Code s 288(1)
Dangerous Drugs Act 1952 s 39B, 39B(1)(a), (2), (2A), (2A)(a), (2A)(b), (2A)(c), (2A)(d)
Penal Code ss 304(a), 326, 376

Nor Hamizah bt Ghazali (State Legal Advisor, Kelantan State Legal Advisor's Office) for the plaintiff.
Ariff Azami bin Hussein (Azizul & Ariff) for the defendant.

Ahmad Bache J:

BACKGROUND

[1] The accused was charged before this court with two counts of trafficking in methamphetamine; a dangerous drugs; an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952, punishable under s 39B(2) or s 39B(2A) of the same Act. The charges were read and explained to the accused. The accused stated clearly that he understood the charges. He wanted to plead guilty to both charges.

[2] The nature and consequence of his plea of guilty were then explained to him. Again the accused unequivocally stated that he understood the nature and consequences of that plea. The accused then pleaded guilty to both charges which plea was accepted by this court as the court was satisfied that there are no occasions that would render the plea to be qualified or that the plea could be vitiated by any other reasons. The prosecution then tendered the facts and exhibits and the same were explained and then admitted by the accused, here too, without any qualification. The accused was then convicted of the charges.

[3] Having heard the accused's plea in mitigation and having given my utmost and anxious consideration of the facts and the law, I have sentenced the accused to life imprisonment together with 15 strokes of whipping for each charge.

[4] Dissatisfied, the public prosecutor filed an appeal to the Court of Appeal, on sentence.

[5] The accused had filed an appeal against the sentence of whipping, on the basis that the total number of whipping ought to be capped at a maximum

of 24 strokes by virtue of s 288(1) of the Criminal Procedure Code ('the CPC').

[6] I have indicated that the full grounds will be given in the event of an appeal. The following are my grounds in arriving at the decision.

THE CHARGE

[7] The charges against the accused read as follows:

First charge

> Bahawa kamu pada 22.9.2016 jam lebih kurang 4.20 petang di hadapan sebuah rumah tanpa nombor Kampung Pasir Pekan Hilir, Wakaf Bharu, di dalam Daerah Tumpat, di dalam Negeri Kelantan, telah mengedar dadah berbahaya jenis Methamphetamine (berat bersih 89.8 gram). Oleh yang demikian kamu telah melakukan satu kesalahan di bawah Seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

Second charge

> Bahawa kamu pada 22/9/2016, lebih kurang jam 4.40 petang, bertempat di hadapan sebuah rumah tanpa nombor , Kampung Pasir Pekan Hilir, Wakaf Bharu, di dalam Jajahan Tumpat, di dalam Negeri Kelantan telah mengedar dadah berbahaya iaitu 843.5 gram Methamphetamine dan dengan itu kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 yang boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

THE FACTS OF THE CASE

[8] The written statement of facts tendered by the prosecution and admitted by the accused and accepted by the court as exh P3 are reproduced below:

1. Bertindak atas maklumat risikan, tertuduh telah ditahan pada 22.09.2016 jam lebih kurang 4.20 petang di hadapan rumah tanpa nombor, Kampung Pasir Pekan Hilir, Wakaf Bharu, Kelantan kerana disyaki telibat dengan aktiviti pengedaran dadah.
2. Sebelum serbuan dibuat, sepasukan anggota serbuan yang diketuai oleh Insp. Muhammad Fitri bin Ridzuan (pengadu) bersama 9 anggota telah membuat pemerhatian di tempat kejadian.
3. Semasa pemerhatian tersebut, pasukan serbuan telah melihat tertuduh memberhentikan kereta jenis Proton Wira warna kelabu gelap No pendaftaran BFT 4560 di hadapan rumah tempat kejadian.
4. Pengadu dan anggota serbuan kemudiannya telah menghampiri tertuduh dan memperkenalkan diri sebagai pegawai polis. Tertuduh bertindak melarikan diri namun telah berjaya di tahan oleh anggota serbuan.

5. Pengadu kemudiannya telah membuat pemeriksaan terhadap kereta yang dinaiki oleh tertuduh dan hasil pemeriksaan tersebut telah menjumpai satu beg berkain jeans warna biru di atas kerusi penumpang hadapan kereta tersebut.

6. Pengadu telah membuat pemeriksaan lanjut terhadap beg berkain *jeans* warna biri tersebut dan telah menjumpai (1) balutan salotep warna kuning. Di dalamnya terdapat pil warna merah disyaki dadah. Turut dijumpai di dalam kereta tersebut (1) beg duit warna biru gelap jenama ARMANI EXCHANGE di dalamnya terdapat (1) kad pengenalan atas nama tertuduh dan (1) kunci motokar dan (1) kunci tertulis REVRIDER yang berada di suis kereta tersebut. Kemudian Pengadu telah menangkap tertuduh.

7. Selanjutnya, pada jam lebih kurang 4.40 petang, bertempat di hadapan rumah nombor di alamat Kampung Pasir Pekan Hilir, Tumpat Kelantan iaitu rumah lain, pengadu telah membacakan kata-kata amaran di bawah Seksyen 37B(1)(b) ADB 1952 kepada tertuduh.

8. Pengadu bertayakan seperti berikui:

S — Adakah kamu ada menyimpan lagi barang salah?

J — Ada

S — Apa yang kamu simpan?

J — Dadah pil kuda

S — Dimanakah kamu simpan dadah pil kuda tersebut?

J — Di rumah sewa

9. Kata-kata amaran tesebut telah di tulis di atas sehelai kertas dan diterangkan kepada tertuduh. Tertuduh talah menadatangani salinan tersebut tanda faham.

10. Selepas itu, tertuduh telah memandu arah pengadu dan anggota serbuan ke sebuah rumah tidak bernombor di Pasir Pekan, Tumpat Kelantan. Apabila sampai ke rumah tersebut, tertuduh sendiri telah membuka pintu hadapan rumah tersebut dengan menggunakan kunci bertulis – Revrider yang dijumai di dalam kereta berkait Wakaf Bharu Rpt 2114/16.

11. Kemudian, pengadu dan anggota dipandu arah oleh tertuduh masuk ke dalam sebuah bilik dan tertuduh telah menunjukkan satu bekas plastic warna merah dalamnya terdapat satu bekas plastic warna hitam di dalamnya terdapat 9 bungkusan warna kuning dan setelah diperiksa terdapat pil-pil merah dan hijau disyaki dadah.

12. Kesemua barang kes kemudian dirampas dan dibawa bersama-sama tertuduh ke pejabat Narkotik IPD Tumpat di mana pemeriksaan lanjut oleh pengadu telah dibuat terhadap barang kes yang dirampas. Pemeriksaan beg kain jeans berwarna biru telah menjumai (1) balutan salotep warna kuning di dalamnya terdapat ... dadah-dadah berkenaan.

[9] *It must be stated that* the confiscated drugs were handed to the investigating officer by the complainant who, thereafter sent the same to the chemist. On analysis, the chemist affirmed that the drugs were methamphetamine weighing 89.8g and 843.5g respectively.

[10] Hence the charges against the accused.

ANALYSIS AND FINDING OF THE COURT

[11] In order to consider the appropriate sentence to be meted out to the accused, I have directed my mind to the admitted facts above, marked as (P3). I have also considered the police report, lodged by the raiding officer, as admitted by the accused and also the photographs of the drugs as admitted by the accused. I have adopted the course as I am conscious of the recent amendment to the Act, vide Act A1558, with effect from 15 March 2018 where the mandatory death sentence is not the only sentence opened to the court for an offence under which the accused is charged.

[12] The concerned amendment introduced amended sub-s (2) and added a new sub-s (2A) to s 39B of the Act, giving the court a discretion to impose a sentence of life imprisonment together with the mandatory minimum 15 strokes of whipping, instead of the mandatory death sentence. That subsection reads as follows:

> (2A) In exercising the power conferred by subsection (2), the Court in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes, may have regard only to the following circumstances:
>
> (a) there was no evidence of buying and selling of a dangerous drug at the time when the person convicted was arrested;
>
> (b) there was no involvement of agent provocateur; or
>
> (c) the involvement of the person convicted is restricted to transporting, carrying, sending or delivering a dangerous drug; and
>
> (d) that the person convicted has assisted an enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[13] The arguments turn on the proper interpretation to be interpreted on this new subsection.

[14] From a reading of the new subsection it is patently clear that this new provision is to create two classes of cases in terms of degree of the accused's involvement in the commission of the offence and this provision caters to the lower degree whereby the case against the accused:

(a) does not involve the buying or selling of a dangerous drugs;

(b) does not involve any agent provocateur; and

(c) that the accused's involvement is limited to transporting, carrying, sending or delivering a dangerous drug.

[15] More importantly the subsection requires the accused to have assisted the enforcement agency in disrupting drug trafficking activities within or outside Malaysia.

[16] It is not in dispute that both the prosecution and the accused agreed that the accused fulfilled all the requirements under sub-s 2A save and except para (d) which is the subject of argument by parties (PP and defence counsel).

[17] To my mind and upon a proper construction, the way the provision is drafted admits to an interpretation that the provision is to be read disjunctively, in that there is a word 'or' appearing after sub-para (b). This to my mind dictates that the accused is entitled to be considered to be sentenced to life imprisonment if he brings himself within either sub-para (a) and (b) OR (c) and (d). In other words sub-para (a) and (b) are to be read conjunctively, inter se and to be read disjunctively from sub-para (c) and (d).

[18] Thus in the present case as there is no dispute that the accused had fulfilled sub-para (a) and (b), the accused then is entitled to be sentenced to a life imprisonment instead of death sentence.

[19] Even if I am wrong in the manner that I have taken in interpreting the provision and that the paras (a)–(d) must be read conjunctively, I am of the considered opinion that the accused had also fulfilled the requirement under sub-para (d). I say so, for the following reasons.

[20] First, in my view the word 'assisting' and 'disrupting drug trafficking' must be read in favour of the convicted person and not restrictively in the determination of the appropriate sentence, since the Act does not offer any definition or explanation on the same.

[21] Secondly the facts of the case as tendered by the prosecution showed that the accused's involvement was only to deliver the drugs in his house found in the car and to keep them in his house. Thereafter he had co-operated fully by leading to the discovery of more drugs (with larger quantity) which would not have otherwise been discovered had the Accused acted differently. The discovery of the drugs will no doubt directly stop the drugs from being circulated in the open market as it were and in other words, had the effect of disrupting any drug trafficking activities.

[22] Though that arrest did not culminate into an arrest of other traffickers, this court is of the considered opinion that there is no such requirement as sub-para (d) is silent on this point. In the upshot I had come to the conclusion that sub-para (d) was also fulfilled.

[23] In meting out that sentences and in determining whether to grant a life imprisonment sentence or impose the mandatory death sentence, the court should adopt the principle that public interest is of paramount importance and should outweigh the personal interest of the accused (*R v Ball* (1951) 51 256) and *Public Prosecutor v Loo Choon Fatt* [1976] 2 MLJ 256).

[24] However the accused's personal interest should not be disregarded at all (see *Tan Sri Abdul Rahim bin Mohd Noor lwn Pendakwa Raya* [2001] 1 MLJ 193). There are circumstances in which public interest itself warrants that the accused should not be put behind bars for far too long as that will do more harm than good as it might cause a crushing effect on him, and could turn him into a hardened criminal.

[25] Hence in an ordinary case which involves imprisonment, a sentence that should be imposed should be one that could induce him to turn from a criminal to an honest life. In the words of Hashim Yeop Sani, High Court Judge Malaya as he then was in the case of *Loo Choon Fatt* who said:

> The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.

[26] Hence this court needs to strike a balance in order to do justice to the accused and to the public. Towards that end, this court had embarked on a balancing exercise, balancing the public interest with that of the accused's interest.

[27] This court is under a duty to consider those mitigations advanced by counsel from the bar table as this case involves a 'plead guilty' case and hence no evidence from witnesses will be forthcoming. This court has to, thereafter make a balancing exercise before passing sentence. In the case of *Raja Izzuddin Shah v Public Prosecutor* [1979] 1 MLJ 270, the court held:

> No plea in mitigation should be thrown aside lightly but must be examined and considered equally with the facts presented by the prosecution. Both aspects of the case must be considered in their true perspective so as to strike if possible, a true balance in the scale of justice.

[28] In the case of *Mohamed Abdullah Ang Swee Kang v Public Prosecutor* [1988] 1 MLJ 167, the court said:

> We have to look at the overall picture of what is the right sentence for the total involvement, the total degree of criminality involved, and we have to keep the sentences in perspective ...

[29] At this juncture it is appropriate for me to refer to the *Hansard* which mentioned the intent and purpose of the Act. It said at pp 30 and 32 thus:

> Tujuan Akta 293 (A293) dibuat antara lain adalah untuk menangani peningkatan aktiviti pengedaran dan perdagangan dadah berbahaya dengan memperkenalkan hukuman mati atau hukuman penjara seumur hidup dan sebatan untuk jenayah tersebut memandangkan hukuman yang diperuntukkan dalam Akta 234 sebelum itu didapati tidak berkesan. Perkara ini telah dinyatakan dalam Laporan Penyata Rasmi Dewan Rakyat bertarikh 8 April 1975 yang mana Yang Berhormat Tan Sri Abdul Kadir Yusuf, Menteri Undang-undang merangkap Peguam Negara pada masa itu telah menyatakan seperti berikut, 'Rang undang-undang ini juga bertujuan mengadakan peruntukan bagi kesalahan memperdagangkan dadah berbahaya dan penalti baginya adalah hukuman bunuh atau penjara seumur hidup disertakan dengan sebat dan rotan. Hukuman seperti ini nampaknya patut memandangkan kepada bertambahnya bilangan kes perdagangan dadah'.
>
> Cadangan pindaan ini digubal dengan teliti dengan mengambil kira niat utama kerajaan, untuk melindungi kepentingan awam, public interest dengan memberikan mesej pencegahan yang serius dan meningkatkan keberkesanan operasi bagi agensi penguat kuasa termasuk PDRM, Agensi Antidadah Kebangsaan, Jabatan Kastam Diraja Malaysia dan Agensi Penguat kuasa Maritim Malaysia dalam membanteras masalah pengedaran dadah dalam negara Malaysia. Cadangan pindaan ini memberi peluang kepada orang yang disabitkan untuk bekerjasama dengan pihak berkuasa bagi memberi maklumat yang mereka memiliki, khususnya berkaitan dengan pihak- pihak terlibat dalam sindiket pengedaran dadah. Maklumat berkenaan boleh membantu agensi penguat kuasa, dalam usaha-usaha untuk membawa kepada penangkapan, penahanan atau pendakwaan mana-mana orang yang terlibat dengan aktiviti pengedaran dadah.

[30] The court had also considered that the accused had pleaded guilty and this had saved the court's time and public fund enormously and substantially. Although there are a long line of authorities, which say that although pleading guilty is a strong mitigating factor for the accused, in certain extreme cases especially involving drugs possession and heinous crime, the plea of guilty will not be considered or be given little weight as public interest outweighs that consideration. But in the circumstances of this case, as I have alluded to earlier, I have attached consideration in favour of the accused. In *Sau Soo Kim v Public Prosecutor* [1975] 2 MLJ 134; [1975] 1 LNS 158, Lee Hun Hoe CJ (Borneo), in dealing with a plea of guilty said in this judgment:

> Whether a person is a hardened criminal or not, I feel that a plea of guilty should be treated as a mitigating factor. It not only saves the country a great expense of a lengthy trial but also saves time and inconvenience of many, particularly the witnesses.

[31] I have also considered the interest of the accused as follows, inter alia, that he was 28 years old at the time of the offence. He is now a divorcee, with a small child from that marriage now under his care. This was also his first offence. He was both remorseful and regretful and wanted to turn over a new leaf upon completion of serving his prison sentence. The accused also suffered severe sickness in prison. This court also took into consideration that any other sentence to be meted out will have an adverse impact on the young child and the accused and his family.

[32] In the circumstances of this case, having balanced the interest of the public as mentioned earlier and the interest of the accused and the objective of this amendment, in the exercise of my discretion, I sentenced the accused to life imprisonment term with effect from the date of his arrest which was 22 September 2016.

[33] Regarding the order of whipping, I have this to say. The amendment made it plain that the minimum number of strokes is 15 and in the present circumstances I am of the view that the minimum strokes be meted out on the Accused. Whipping, in my view has been proven to be an effective deterrent. And this court notes that if the sentence of whipping is to be imposed, the number of strokes must be sufficient to deter those who think they can avoid detection and arrest from the authorities and thereafter breaking the law, and making profit out of this crime. In the circumstances this court is of the considered opinion that 15 strokes is enough for him to suffer the excruciating pain of whipping. Any higher than that will have physical effect on the accused.

Concurrent or consecutive sentence?

[34] It is to be noted that the exercise of the discretion of the court to determine the date of the commencement of the imprisonment is dependent on the facts and circumstances of each case. In determining whether the sentences are to run concurrently or consecutively, the courts may use the one transaction principle or the totality principle (see *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 (CA)).

[35] The one transaction principle applies where two or more offences were committed in the course of a single transaction, and the sentences for these offences should be concurrent. For there to be one transaction four elements should be present ie proximity of time, proximity of place, continuity of action and continuity of purpose or design (see *Jayaraman & Ors v Public Prosecutor* [1979] 2 MLJ 88; *Amrita Lal Hazra vs Emperor* (1915) ILR 42 Cal 957).

[36] This can be well explained by referring to the case of *Public Prosecutor v Prabu s/o Veeramuthu & Ors* [2009] 3 MLJ 838. Based on the facts of the case

both the accused were charged with two charges of culpable homicide not amounting to murder under s 304(a) of the Penal Code. The court ordered the sentences of 16 years' imprisonment on each charge to run concurrently since the offences were committed in a single transaction.

[37] Similarly in *Annantan Subramaniam v Public Prosecutor* [2006] MLJU 648; [2007] 8 CLJ 1, the appellant pleaded guilty for the offence of rape under s 376 of the Penal Code and for voluntarily causing grievous hurt to the same victim under s 326 of the Penal Code. On appeal, the court held that there was continuity of action since both offences were clearly connected by proximity of time and place. Thus the sentences should run concurrently.

[38] Reverting back to the case at hand, in the light of the authorities and the laws averted to earlier, as the present offence was committed on the same day, at the same time and at the same place with that of the other offence and that there was continuity of action and purpose, hence clearly the one transaction principle applies. What is more, the accused was charged for committing the same offence and under the same section of the Act (the DDA 1952). Thus the offences are also not distinct to each other. Hence the sentence should run concurrently.

[39] By virtue of s 288(1) of the CPC, understandably the maximum number of whipping to be capped at 24 strokes.

CONCLUSION

[40] In upshot this court sentenced the accused to imprisonment for life and 15 strokes of whipping. Order accordingly.

Order accordingly.

Reported by Izzat Fauzan